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No. 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, deceased; H. E. FRANTZ, Executor of the Estate of William R. Gilpin, deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, deceased; BEN WILLIAMSON, JR., and DAVIS GEIGER, Co-Executors of the Estate of Ben Williamson, deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, deceased; HENRY SANDIFER, Executor of the Estate of Alexander B. Massey, deceased,

Respondents.

REPLY BRIEF FOR PETITIONER

ROBERT S. MARX,
FRANK E. WOOD,
HARRY KASFIR,
EDWARD M. BROWN,
Attorneys for Petitioner.

Of Counsel:
NICHOLS, WOOD, MARX & GINTER.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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REPLY BRIEF FOR PETITIONER

Because two of the briefs for the respondents raise in this court for the first time a question which was not presented in the briefs or arguments made in the lower courts, this brief is submitted to meet this entirely new issue. The question is raised specifically as the second point in the brief submitted by Mr. LeWright Browning, counsel for the respondents, Ben Williamson, Jr. and Davis Gei-

ger, co-executors, et al., and is the principal issue argued in a separate brief submitted on behalf of the respondent, Henry G. Sandifer, executor of the estate of Alexander B. Massey.

In substance this new issue, raised in this court for the first time, is this. Counsel for respondents argue that this court cannot, within the limitations of its rule-making powers under Section 723(b), Title 28 U. S. C., extend the two-year period prescribed by Rule 25(a) by permitting an enlargement of time under Rule 6(b) or by promulgating the amendment to Rule 25(a) proposed by the Advisory Committee on Rules for Civil Procedure in its report dated June, 1946, which has the same effect.

In our main brief it was shown that the effect of the amendments proposed by the Advisory Committee to Rules 6(b) and (25(a) is specifically to carry over into Rule 25(a) the discretion to act after the expiration of the two-year period upon a showing of reasonable excuse for failure to apply within that period which is provided generally by the present Rule 6(b). We will not reargue that point, but will address ourselves solely to the issue now raised by respondents that neither the general discretionary powers for enlargement of time provided by the present Rule 6(b) nor the specific provision for the exercise of discretion in enlarging the time for substitution of the personal representative of a deceased party to a pending action incorporated in the amendment proposed by the Advisory Committee, is within this court's rule-making powers.

Stripped of its essential , respondents' arguments are that under Section 723(b), Title 28 U. S. C., this court can "neither abridge, enlarge nor modify the substantive rights of any litigant"; that Section 778, Title 28 U. S. C. creates a *substantive* right of revivor and a two-year limitation thereon; that this action abated at common law and

is revived only by force of Section 778; and that this court cannot promulgate a rule which changes the two-year limitation contained in the second paragraph of Section 778.

The premise upon which the argument is based is fallacious. In the first place, Section 778 by its express language does not purport to deal with the substantive question of whether a cause of action survives. It provides merely that when either of the parties in a suit in any court of the United States dies before final judgment, "the executor or administrator of such deceased party may, *in case the cause of action survives by law*, prosecute or defend any such suit to final judgment." (28 U. S. C., Section 778, emphasis supplied.)

The statute did not purport to be determinative of the *substantive* question as to the survival of the cause of action upon the death of a party. It merely provided a *procedure* for bringing in the representatives of a deceased party in the event that the cause of action did survive.

The issue here is not decided by adumbrations concerning the maxim *actio personalis moritur cum persona* nor by reference to cases which fail to distinguish between abatement in the sense that the cause of action does not survive, and abatement in the sense that a pending action is suspended until it is revived by or against the executors or other representatives of a deceased party. Exploration of the ancient recesses of the common law for the origin and effect of the maxim may reveal that all causes of action at one time abated—in the first sense of the word—but as of the time of the American Revolution the common law had emerged at least partially from the obscurity which surrounds its true import and significance. See Holdsworth, *History of the English Law* (3rd Ed.), Vol. III, pp. 576 et seq. As of that date causes of action *ex contractu*

did not abate, *Hambly* v. *Trott* (1776), Cowp. 371, 376; *Sullivan* v. *The Associated Bill Posters and Distributors* (1929), 6 F. (2d) 1000, 1004, the representatives of a deceased person could be made liable in an action of assumpsit upon the obligations of the deceased, Holdsworth, *supra*, pp. 451-2, 578-9, and procedures for reviving an action which survived the death of one of the parties had become a part of law and equity.

The survival of the cause of action to recover the stockholders' liability from deceased defendants in this case is not dependent upon Section 778. The cause of action here rests upon the provisions of the federal acts governing national banks. Sections 63 and 64 of Title 12 U. S. C. imposed double liability upon the shareholders of every national banking association and transferees, and Section 66 imposed the same liability upon the estates and funds in the hands of executors, administrators, guardians or trustees in a like manner and to the same extent as the testator, intestate, ward or persons interested in such trust funds would be liable if living. Where the stockholder dies during the pendency of an action to enforce a stock assessment, this court expressly has held that the cause of action provided by the national bank acts survives and may be enforced against his estate. *Richmond* v. *Irons* (1887), 121 U. S. 27, 55-6; *Matteson* v. *Dent* (1900), 176 U. S. 521, 525; and see *Forest* v. *Jack* (1935), 294 U. S. 158; *Seabury* v. *Green* (1935), 294 U. S. 165; *Pufahl* v. *Estate of Parks* (1936), 299 U. S. 217, and cases cited in Michie, *Banks and Banking*, Volume 7, Chapter 15, Section 98, page 94 et seq.; *Rankin* v. *Miller et al.* (1913), 207 Fed. 602, 611.* The federal banking acts impose no limi-

* In *Richmond* v. *Irons* (1887), 121 U. S. 27, Mr. Justice Matthews said, in part:

"Another assignment of error is peculiar to the appeal of the administrator *de bonis non* of Willian H. Adams, deceased. William H. Adams in his lifetime was one of the defendants in the amended

tation upon the time within which a suit against a stockholder to recover an assessment must be brought, *Rawlings* v. *Ray* (1941), 312 U. S. 96, and no claim is made that the original suit was not commenced within the time permitted by applicable state limitations statutes.

Thus the entire argument of respondents that this action survives by reason of Title 28 U. S. C., Section 778, is based upon a false premise. The cause of action to recover the assessment survived regardless of Section 778. That section merely provided a procedure for bringing in the executor or administrator of a deceased party.

Therefore the question resolves itself to a determination whether the procedure for reviving a cause of action provided by Section 778 was of such a substantive nature as not to be subject to the rule-making power of this court granted under Title 28 U. S. C., Section 723(b).

The argument of the respondents seems to be that without Section 778 the courts of the United States had no power in a case of this nature to substitute the personal representative of a party who died during the pendency

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bill of 1876, and at the time of the suspension of the bank a stockholder to the extent of 240 shares. He died June 6, 1882, during the pendency of the suit, which stands revived as against his administrator *de bonis non*. The administrator contended that the personal liability of his intestate did not survive as against the administrator, and that, therefore, no decree could be rendered against him subjecting the estate of Adams in his hands for administration." (121 U. S. 55.)

After distinguishing Massachusetts cases because the state statutes differed from the national banking act, Mr. Justice Matthews continued, speaking of the language of the national banking act:

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives." (121 U. S. 55-6.)

of an action. This is not so. The case at bar is in equity.[1] Section 778 was not made applicable to suits in equity until 1921, but there was never any doubt that the federal courts had the power to require or permit the personal representatives to come in and prosecute or defend an action which survived a defendant's death. As Mr. Justice Story said in *Clarke* v. *Mathewson* (1838), 12 Peters (37 U. S.) 164, 171:

> "The death of either party, pending the suit, does not, where the cause of action survives, amount to a determination of the suit. . . . in courts of equity, an abatement of the suit, by the death of a party, has always been held to have a very different effect; for such abatement amounts to a mere suspension, and not to a determination of the suit. It may again be put in motion by a bill of revivor, and the proceedings being revived, the cause proceeds to its regular determination as an original bill. The bill of revivor is not the commencement of a new suit; but is the mere continuation of the old suit."

Substitution in equity of the personal representative of a party who died during the pendency of an action was effected through a bill of revivor or a bill of that nature. *Ex parte Slater* (1918), 246 U. S. 128, 133. This procedure was incorporated by this court into Rule 56 of the Rules of Equity Practice. 210 U. S. 526. When this court promulgated new equity rules in 1912 it changed and simplified the procedure for revivor by providing that in the event of the death of a party the suit could be revived upon motion by substitution of the proper parties. Rule 45, 226 U. S. 661. Equity Rule 45 contained no period of limi-

[1] Like *Anderson* v. *Abbott* (1942), 321 U. S. 349, in the Western District of Kentucky, the principal case which determined the liability of shareholders of the Banco-Kentucky Company to respond as the real owners of the stock of the National Bank of Kentucky, this companion case was a bill in equity to enforce the liability against stockholders of Banco-Kentucky residing in the Eastern District of Kentucky.

tations within which revivor had to be applied for. See *Miller* v. *Wattier* (1908), 165 Fed. 359, 361.[2]

Until 1921, Section 778, which adopted the common law writ of *scire facias* as a procedure for the substitution of an executor or an administrator of a deceased party, applied only to actions at law and did not contain any limitation period. In 1921 Congress added paragraphs two and three of Section 778, thereby substituting the procedure by writ of *scire facias* for the remedy by motion previously provided by Equity Rule 45, *supra*. The amendment of 1921 also added the two-year period of limitation which respondents say this court cannot modify under its rule-making powers.

There seems to be no contention that this court acted beyond the scope of its rule-making powers in abolishing the remedy by *scire facias*. *Rules of Civil Procedure*, Rule 81(b), 308 U. S. 764. In substituting the remedy by motion for the remedy by *scire facias*, it has not been suggested that this court abridged the substantive rights of any litigant. When the rules were discussed before the appropriate committees of the House of Representatives and Senate, it was nowhere urged that this court acted beyond the powers delegated to it to promulgate the rules in substituting the remedy by motion for the remedy by *scire facias* previously provided by Section 778. It could scarcely be argued that this substitution was a matter of substance rather than procedure.

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[2] Although the case at bar is in equity, it may be noted in passing that at common law the law courts were not devoid of power to bring in the personal representatives of a litigant where the right of action was one which survived the death of a party. As was said in *Warren* v. *Furstenheim* (1888), 35 Fed. 691, 693, "One class of English statutes having the force of common law with us . . . allowed the executor or administrator to come in voluntarily or be brought in by *scire facias*. It was a condition of these statutes that the revival could take place only 'if such action might be originally prosecuted, or maintained by or against the executors or administrators of the party dying.'" See 47 *American Jurisprudence, Scire Facias*, Section 3, page 466. Congress adopted this remedy in the Act of September 24, 1789, Chapter 20, Section 31, 1 Stat. 90, from which the first paragraph of Section 778 was derived.

If this court can change the remedy previously provided by Section 778 because such a matter is procedural and not substantive, it would seem to follow that any period of limitations applicable to the earlier remedy is also a matter of procedure rather than substance. Although, as this court pointed out in *Guaranty Trust Company* v. *York* (1945), 326 U. S. 99, 108-9, characterization of statutes of limitations as either "substantive" or "procedural" unrelated to a specific issue do not provide a solution for a particular problem, it is true, as this court said in *Michigan Insurance Bank* v. *Elred* (1889), 130 U. S. 693, 696, that statutes of limitations ordinarily are laws affecting remedies only, and not rights. The decisions cited by counsel for respondents are cases where the right of action and the procedure for enforcing it were created by the same statute. Such cases involve statutory rights of action which did not exist at common law, and the period during which the statutory remedy for the statutory right may be enforced was considered to be an integral part of the right of action and not just a limitation upon the remedy. *Texas Cement Co.* v. *McCord* (1914), 233 U. S. 157, cited by counsel for respondents, illustrates the difference between the effect of a limitation contained in a statute which creates a cause of action where none exists apart from that statute, and a limitation such as that involved here. That case involved the construction of the material man's Act of February 24, 1905, as to which Mr. Justice Day, speaking for the entire court, said:

> "By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically

> conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself." (233 U. S. 157, 162.)

In the case at bar, Section 778 did not create the cause of action. The liability of the stockholder and his estate were created by Title 12, U. S. C., Sections 63, 64 and 66.

Treatment of statutes of limitations as "substantive" or "procedural" in situations involving the pursuit of a particular type of remedy point the way toward the proper decision on the particular problem involved here. Thus, if Congress had amended Section 778 by striking out the two-year limitation period, could it be claimed this was a deprivation of property as applied to a case in which the two-year period had already run? In *Campbell* v. *Holt* (1885), 115 U. S. 620, this court pointed out that the usual statute of limitation merely bars a remedy and does not extinguish a right; hence the repeal of a statute of limitation of actions on personal debts does not deprive a debtor, as to whom the time had run, of his property in violation of the Fourteenth Amendment. The principle applied by that case was recently approved by this court in *Chase Securities Corporation* v. *Donaldson* (1945), 325 U. S. 304.

That problems relating to revivor concern procedural rather than substantive law is also indicated by those cases which consider the problem with relation to the conflict of laws. In such cases questions regarding the survival of the cause of action are substantive matters which it is uni-

formly held must be determined by the law of the place where the cause of action arose, but questions regarding revival are treated as matters of procedure to be determined by the law of the forum. *Baltimore and Ohio Railroad Company* v. *Joy* (1899), 173 U. S. 226. And see Annotation, 87 A. L. R. 852.

Commentators on the Rules of Civil Procedure uniformly have stated that the mode, means and manner of substituting the personal representatives of a deceased party and similar matters are procedural. Thus, in *Moore Federal Practice*, 1938, Volume 2, page 2427, it is said, commenting on Rule 25:

> "Rule Does Not Affect Substantive Rights.
> "Rule 25 merely provides the procedure for the substitution of parties; it does not affect substantive rights, which will determine whether the action abates."

Likewise, in *Ohlinger's Federal Practice*, 1939, Volume 3, page 35, it is said:

> "In the annotation to U.S.C. 28:725, cases on survival, abatement and revival are discussed. It is there pointed out that *survival of a cause of action* ("claim for relief" under these rules) is properly a question of substantive law, while *revival of a pending suit* is properly procedural."

In the last mentioned comment it was noted that in the case of *In Re: Connaway, Receiver of Moscow National Bank* (1900), 178 U. S. 421, it was decided that revival is a procedural matter.[3]

Thus respondents are forced to the illogical argument that although the remedy by *scire facias* provided by para-

[3] It should also be noted that in the United States Code, prepared under the authority of Title 1, U. S. C., Section 52, Section 778 is included under Chapter 18 of the Judicial Code. Chapter 18 is headed: "Procedure."

graph one of Section 778 was a procedural or remedial matter which this court could change under its rule-making powers, the limitation upon that remedy added by Congress in 1921, over 130 years after the original remedy was adopted from the common law, rises above the status of a procedural matter and becomes substantive and, therefore, beyond the power of this court to change. We think that the authorities above referred to clearly show that the entire matter of the remedy for substituting the personal representatives of a deceased party, and particularly any limitations thereon, is entirely procedural and well within the rule-making powers of this court.[1]

Respectfully submitted,

ROBERT S. MARX,
FRANK E. WOOD,
HARRY KASFIR,
EDWARD M. BROWN,
Attorneys for Petitioner.

Of Counsel.

NICHOLS, WOOD, MARX & GINTER.

[1] It may be noted that somewhat the same contention as that which respondents urge here might be made with respect to Rule 73(a). The Advisory Committee has proposed an amendment which changes the time within which an appeal from the district court to a circuit court of appeals may be made. The time differs from that prescribed by Title 28, U. S. C., Section 230. That such a change of the statutory time is considered a procedural matter well within the rule-making powers of the court is indicated by the fact that this amendment was recommended by the Judicial Conference of the Senior Circuit Judges. See report of Advisory Committee, June 1946, pages 92-95.

APPENDIX

STATUTES INVOLVED

12 U. S. C.

§ 63. Individual liability of shareholders.

The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association existing on June 22, 1874, under State laws, having not less than $5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this chapter; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of this chapter relating to dissolution and receivership. R. S. § 5151.

12 U. S. C.

§ 64. Same; transfer of shares.

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent

that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. Dec. 23, 1913, c. 6, § 23, 38 Stat. 273.

12 U. S. C.

§ 66. Personal liability of representatives of stockholders.

Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name. R. S. § 5152.

28 U. S. C.

§ 723b. Rules in actions at law; Supreme Court authorized to make.

The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect. June 19, 1934, c. 651, § 1, 48 Stat. 1064.

28 U. S. C.

§ 778. Death of parties; substitution of executor or administrator.

When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of

action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly, and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

The provisions of this section shall apply to suits in equity and in admiralty as well as to suits at law, and the jurisdiction of all courts of the United States shall extend to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any State or Territory of the United States, and such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its scire facias to executors and administrators appointed in any State or Territory of the United States which may be served in any judicial district by the marshal thereof. No executor or administrator shall be made a party unless such service is made before final settlement and distribution of the estate of said deceased party to the suit.

This section shall apply to suits in which any party has deceased prior to November 23, 1921, as well as to suits in which any party may have died thereafter or may die hereafter. (R. S. § 955; Nov. 23, 1921, c. 142, §§ 1, 2, Stat. 324; Dec. 22, 1921, c. 18, 42 Stat. 352.)